

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA**

IN RE:

TIBURON POINTE APARTMENTS, L.L.C.

Debtor.

CASE NO. 10-81026

Chapter 11

**OBJECTION TO MOTION TO  
APPROVE PROCEDURES FOR  
INTERIM COMPENSATION AND  
REIMBURSEMENT OF  
PROFESSIONAL FEES**

Wells Fargo Bank, N.A., as trustee (“Lender”) for CMBS Pool CSFB 2003-C5 acting through ING Clarion Capital Loan Services, LLC, as special servicer, files this objection to the Motion to Approve Procedures for Interim Compensation and Reimbursement of Professional Fees (the “Motion”). In support of this objection, Lender states the following:

**BACKGROUND**

**A. The Lender’s Secured Claims**

1. On or about June 9, 2003, Lender’s predecessor in interest, loaned \$2,950,000 (the “Loan”) to Tiburon Pointe Apartments, L.L.C. (the “Debtor”). The Loan, and the Debtor’s obligation to repay the Loan, is evidenced by, *inter alia*, a Promissory Note in the original principal amount of \$2,950,000.00 dated June 9, 2003 made and delivered by the Debtor.

2. To secure the Debtor’s obligations to repay the Loan, the Debtor executed and delivered (i) a Deed of Trust and Security Agreement (the “Deed of Trust and Security Agreement”) executed on May 6, 2003, dated as of June 9, 2003; and (ii) an Assignment of Leases and Rents (the “Assignment of Leases and Rents”) dated as of May 6, 2003, to be

effective as of June 9, 2003. The Deed of Trust and Security Agreement was recorded on June 9, 2003, as Instrument Number 2003-31436, of the Records of the Register of Deeds of Sarpy County, Nebraska. The Assignment of Leases and Rents was recorded on June 9, 2003, as Instrument Number 2003-31437, of the Records of the Register of Deeds of Sarpy County, Nebraska.

3. Lender is the holder of the Note and the assignee of the Deed of Trust and Security Agreement and the Assignment of Leases and Rents (together with all ancillary loan documents and instruments, the "Loan Documents").

4. Pursuant to the Loan Documents, Lender holds a valid and perfected mortgage lien and security interest in, inter alia, an apartment complex (and the leases and rents related to and arising therefrom) located at 16895 Oakmont Drive, Omaha, Nebraska and commonly known as the "Tiburon Pointe Apartments" Through the Assignment of Leases and Rents, the Debtor irrevocably and absolutely assigned, transferred and conveyed to Lender, inter alia, all of the leases, rents, profits and revenues related to and arising from the Tiburon Pointe Apartments .

5. The Debtor failed to make the required payments under the Loan Documents and breached several other payment obligations set forth in the Loan Documents. In August, 2009 and September, 2009, the Lender notified the Debtor of its defaults under the Loan Documents. The amount presently due and owing from the Debtor to the Lender pursuant to the Loan Documents is in excess of \$3.1 Million.

6. As a result of the Debtor's continuing defaults, the Lender incurred substantial time and expense in causing non-judicial sales of the Lender's Real Property Collateral to be scheduled, noticed and advertised. The Trustee's sale, scheduled in accordance with Nebraska law, was to be first published on April 13, 2010 and the sale was scheduled for May 26, 2010  
4844-7990-5798.1

(the “Foreclosure Sale”) on the Tiburon Pointe Apartments. Five days prior to the date scheduled for first publication, the Debtor filed a petition under Chapter 11 of the Bankruptcy Code.

**B. The Lender’s Cash Collateral**

7. The Lender has perfected liens upon all leases, rents, revenues, cash and accounts paid or payable to the Debtor by the tenants of the Tiburon Pointe Apartments.

8. All rents, revenues, cash and accounts paid or payable to the Debtor by the tenants of the Tiburon Pointe Apartments constitute cash collateral (the “Lender’s Cash Collateral”). 11 U.S.C. § 363(a). Moreover, pursuant to the Loan Documents, the Lender’s liens and security interests encumber not only the Lender’s Cash Collateral existing on January 26, 2010, the date the Debtor filed its Chapter 11 petition (the “Filing Date”), but also all rents, revenues, cash and accounts paid or payable to the Debtor by the tenant of the Tiburon Pointe Apartments after the Filing Date. 11 U.S.C. § 552(b)(1)(post-petition rents, charges, accounts or other payments for the use or occupancy of property encumbered by security agreement are subject to pre-petition liens).

9. On May 11, 2010, this Court entered its Order Approving Motion to Use Cash Collateral, and for Approval of Adequate Protection Payments (Docket No. 36)(the “Cash Collateral Order”). The Cash Collateral Order recognized Lender’s Cash Collateral interests and ordered that the Debtor use the Lender’s Cash Collateral only for those expenditures set forth on Exhibit A to the Order. *See* Cash Collateral Order at Paragraph 3(a).

10. The Cash Collateral Order does not permit the Debtor to use Lender’s Cash Collateral for payment of fees and expenses of the Debtor’s professionals.

**C. OBJECTION TO MOTION**

11. Because the Debtor does not have authority to use the Lender's Cash Collateral to make payments to the Debtor's professionals and, upon information and belief, the Debtor has no other funds from which to make payments to the Debtor's professionals, the Motion should either be denied or any Order entered upon the Motion should expressly prohibit the Debtor from using Lender's Cash Collateral to make payment to the Debtor's professionals.

WHEREFORE, the Lender objects to the Motion and respectfully requests that the Court enter its Order denying the Motion or, in the alternative, expressly prohibiting the Debtor from using the Lender's Cash Collateral to make payment to the Debtor's professionals.

Dated this 24<sup>th</sup> day of June, 2010.

Wells Fargo Bank, N.A., as trustee for CMBS Pool CSFB 2003-C5 acting through ING Clarion Capital Loan Services, LLC, as special servicer

By s/ Jeffrey T. Wegner  
Jeffrey T. Wegner #18265  
Andrew Whealy #23988  
Kutak Rock LLP  
The Omaha Building  
1650 Farnam Street  
Omaha, NE 68102-2186  
(402) 346-6000

**CERTIFICATE OF SERVICE**

I hereby certify that on June 24, 2010, I electronically filed the foregoing with the Clerk of the Bankruptcy Court using the CM/ECF system which sent notification of such filing to the following registered users:

- Donald P. Dworak ddworak@stinson.com, ldecker@stinson.com
- Patricia Fahey ustpregion13.om.ecf@usdoj.gov
- Jerry L. Jensen Jerry.L.Jensen@usdoj.gov
- J.P. Sam King samking@mgwl.com
- James E. Lang jimlang@lpllaw.com

s/ Jeffrey T. Wegner